Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 79-1708

STATE OF NEW YORK,

Petitioner,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

No. 79-1716

S & E SHIPPING CORP.,

Petitioner,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

No. 79-1718

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

BRIEF OF RESPONDENT SOO LINE RAILROAD COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The State of New York, S & E Shipping Corp. and Seafarers International Union of North America, AFL-CIO, have petitioned this Court for issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit, which affirmed an order of the Interstate Commerce Commission.[1] The Commission's decision (reproduced in New York's Petition as Appendix B) affirmed the lawfulness of unit train rates on grain moving from Minneapolis-St. Paul, Minnesota and Duluth, Minnesota-Superior, Wisconsin to Martins Creek, Pennsylvania. Specifically, the Commission found said unit train grain rates did not violate Section 3(4) of the Interstate Commerce Act (49 U.S.C. § 3(4))[2] which prohibits discrimination in rates, fares and charges between connecting lines including "any carrier subject to the provisions of this chapter or any common carrier by water subject to Chapter 12 of this title" (also known as "part III" of the Interstate Commerce Act).

QUESTION PRESENTED

Whether Conrail's division of unit train grain rate from origins west of Chicago, Illinois to Martins Creek, Pennsylvania, which it has offered to publish on ex-lake traffic from Chicago, Illinois, violates §3(4) of the Interstate Commerce Act because it produces lower earnings per

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[1]A panel of the Court affirmed the Commission order by decision dated May 7, 1979, Judge Timbers dissenting. On January 31, 1980 the Court denied petitions for rehearing and rehearing en banc. (See App. C, E and F attached to New York Petition.)

[2]As recently recodified the substance of § 3(4) is now found in 49 U.S.C.10701(c) and 10742. Subsequent references to provisions of the Act will identify appropriate sections thereof prior to recodification.

mile than a 5-car grain rate from Buffalo, New York to Martins Creek, Pennsylvania.

STATEMENT OF THE CASE[3]

In the fall of 1973 the Soo Line Railroad Company and Erie Lackawanna Railroad Company (now Conrail) published summer and winter unit train wheat rates from the Twin Ports (Duluth-Superior) and the Twin Cities (Minneapolis-St. Paul) to Martins Creek, Pennsylvania. The summer and winter rate levels (originally 72.25¢ and 88¢ per cwt.) were established through negotiations with ConAgra, Inc., a milling company which had recently established a flour mill at Martins Creek, Pennsylvania, to meet that shipper's alternative transportation costs in moving wheat from Duluth to Martins Creek. Specifically, the summer rate level was designed to meet ConAgra's alternative transportation cost in moving wheat from Duluth to Martins Creek by water-rail or water-truck over Buffalo, New York.

As a result of protests to the proposed rates being filed by numerous parties, including Lake Carriers' Association and the Great Lakes Shipowners' Association, the Interstate Commerce Commission suspended the proposed rates for seven months and conducted an investigation into their lawfulness.[4] In the initial Commission investigation proceeding, ICC Docket I&S 8899, Lake Carriers' Association appeared and introduced evidence in opposition to the

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[3]While the sole legal issue properly raised by petitioners is not complex, a complete description of the involved unit train rates, the proceedings before the Commission, and the Appeals Court's decisions is essential to place that issue and the petitioners' interest therein in proper focus.

[4]The summer and winter rates have been in effect, subject to frequent escalations, since June 1, 1974.

proposed rates. The Great Lakes Shipowners' Association never participated in the Commission hearings or subsequent proceedings.

By Decision served July 18, 1974, Division 2 of the Commission upheld the lawfulness of the winter rate from both origin areas and the summer rate from the Twin Ports to Martins Creek. A majority of Division 2, however, found the summer rate from the Twin Cities to Martins Creek to be unlawful.

The proponent railroads and ConAgra petitioned the Commission for reconsideration of that part of its decision finding the Twin Cities-Martins Creek summer rate to be unlawful. The State of New York, which intervened in the proceedings *on behalf of Buffalo interests* after the Commission record had been closed, and Lake Carriers' Association petitioned for reconsideration of the Commission's decision finding the summer rate from the Twin Ports to Martins Creek to be lawful.

The petition for reconsideration filed by Lake Carriers' Association stated in part:

> "Protestant Lake Carriers' Association accepts respondents' premise that, in setting the level of the proposed rate, respondents do not intend to go any lower than necessary to meet the alternative transportation cost to the shipper. In essence, *as long as the alternative costs to the shipper all-rail versus lake-rail are equivalent, the lake carrier industry has no objection.*" (Emphasis supplied)

Lake Carriers' reconsideration petition also stated that the 1974 summer rate level "should not be pegged any lower than 88¢" due to increased lake costs occurring subse-

quent to the fall of 1973. As of the summer of 1974 when Lake Carriers' petition was filed, the summer unit train rate had been increased to 89¢ per cwt., *one cent higher than that advocated by the only party in the Commission proceedings representing the interests of lake carriers.*

By Report and Order served February 11, 1976, the Interstate Commerce Commission affirmed the prior Division 2 decision finding the winter rate and the summer rate from the Twin Ports to Martins Creek to be lawful. It reversed the prior decision's finding with respect to the summer rate from the Twin Cities to Martins Creek. Thus the Commission's final decision upheld the lawfulness of both summer and winter rate levels from both origin areas to Martins Creek, PA.

The Commission's 1976 decision was reviewed by the United States Court of Appeals for the Second Circuit in *State of N.Y. v. United States*, 568 F.2d 887 (1977), following the filing of a review petition by the State of New York. That decision remanded the matter to the Commission "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines" (568 F.2d 898) in violation of Section 3(4).[5]

Following the Court's remand the Commission afforded all interested parties the opportunity to supplement the

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[5]While the Court's first decision states that *"Exempt Water Carriers are entitled to Section 3(4) Protection"* (568 F.2d 894), it only faulted the Commission for its apparent conclusion "that carriers exempted from regulation when they carry commodities in bulk[14] are not 'subject to part III' for purposes of protection under § 3(4)" (id at 895). Footnotes 13 and 14 of the Court's decision (ibid) clearly reflect its recognition that *§ 3(4) does not afford any protection to water carriers which hold no Commission authority to transport commodities by water in interstate commerce.*

record and to reply to opening statements filed by opposing parties. The supplemental statement filed on behalf of Conrail clearly demonstrated the rail rate from Buffalo to Martins Creek "applies on all traffic regardless of inbound mode." Furthermore ConRail assured the Commission it was "ready, willing and able to consider any proposal for the movement of the traffic in question when received ex-water via Chicago on the same basis it presently extends to its rail connection."

The statement filed on behalf of the Soo Line demonstrated that Lake Carriers' Association represented only one water carrier having a certificate of public convenience and necessity issued by the Commission. However Commission records did not indicate that carrier had any interest in transpotration of grain.[6] The only water carrier actively participating in the reopened Commission proceedings following the Court's remand was S & E Shipping Corporation, *a water carrier having no part III authority from the Commission.*

By Report and Order served January 30, 1978 the Commission, in compliance with the Court's remand order, carefully reviewed the issue of whether the unit train rates violated Section 3(4) of the Act. The Commission specifically recognized "that part III water carriers are entitled to the protection of section 3(4) although their carriage of wheat in bulk exempts them from regulation under section 303(b) of the Act." The Commission correctly

[6]While certain water carriers represented by Great Lakes Shipowners' Association held certificates issued under Part III of the Interstate Commerce Act, the Association did not participate in the Commission proceedings after filing its suspension petition in 1973. The 1976 annual report of the regulated carriers represented by Great Lakes Shipowners' Association clearly indicated those water carriers have no interest in the transportation of grain on the Great Lakes.

found that differences in operating conditions and circumstances justified Conrail's refusal to publish unit train rates from Buffalo, New York to Martins Creek, Pennsylvania reflecting the same revenue per mile as its division of the through unit train rates from Minnesota-Wisconsin origins to Martins Creek. That Commission finding is fully supported by the record developed in both Commission proceedings.

The Commission then concluded:

> "What has been said above with respect to Buffalo does not apply to the route via Chicago to Martins Creek. Inasmuch as the operating conditions attending the ex-rail movements of grain from Chicago to Martins Creek would be substantially similar to those attending ex-lake rail movements from Chicago to Martins Creek, a refusal by Conrail to participate in joint rates and through routes with the connecting lake carriers on ex-lake wheat shipments from Chicago to Martins Creek on the same basis as accorded Soo in connection with the all-rail route would unjustly discriminate against connecting part III water carriers in violation of section 3(4) of the Act. Conrail states that it has received no request from any lake carrier seeking like rate treatment on ex-lake wheat shipments from Chicago to Martins Creek, and this averment has not been disputed by the protestants. *Since it appears that Conrail now stands ready and willing, upon request, to handle ex-lake traffic from Chicago on the same basis as it now handles ex-rail traffic from Chicago, there appears to be no violation of section 3(4) of the Act.*" (Emphasis supplied)

Following the filing of petitions for review of the Commission's January 30, 1978 report and order by the

State of New York and S & E Shipping Corporation, the Commission's decision was affirmed by a majority panel of this Court, Judge Timbers dissenting. Concerning the petitioners' allegation that the five car 40¢ per cwt. rate from Buffalo, New York to Martins Creek, Pennsylvania was discriminatory because it reflected higher per mile earnings than Conrail's division of the through unit train rate to Martins Creek, the Court's second decision noted:

> "The rate eastward from Buffalo was the same, however, regardless of whether the grain movement into Buffalo from the west was by ship, rail or truck. Clearly no carrier from the west could claim that it was being discriminated against because of the higher Buffalo to Martins Creek rate."

The Court went on to note that the proposed unit train rate had been challenged in the initial hearings before the Commission:

> ". . . because similar unit-train rates were not made available to elevators in Chicago. Their contention that this unavailability violated sections 4(1) and 3 (1) of the Act was rejected by the Commission. Following remand, however, the Commission held that operating conditions attending ex-rail and ex-lake movements of grain from Chicago to Martins Creek would be substantially similar and that it would be a violation of section 3(4) if Conrail refused to participate in joint rates and through routes with lake carriers at Chicago on the same basis as it did with the Soo Railroad. Conrail has indicated its willingness to do so. However, no request for such service has yet been made by any lake carrier."

The Court also found the Commission "properly received additional evidence as to the effect of the disputed tariffs" and stated:

> "This showed that, between 1973 and 1976 annual shipments of wheat to Buffalo by lake carrier increased by over 16.5 million tons, or approximately fifty percent. It disclosed also that despite the adoption of the challenged unit-train rates, about fifty percent of ConAgra's wheat requirements are still transported by lake carrier and seventy percent of all grain movements from Buffalo to Martins Creek are by truck. This evidence gives little support by petitioner's claim of discrimination."

Accordingly, the petition for review was denied and the Commission's January 18, 1978 order was affirmed.

On January 31, 1980 the United States Court of Appeals for the Second Circuit denied petitions for rehearing and rehearing en banc which had been filed by petitioners herein.

REASONS FOR DENYING THE WRIT

Limited Interest of Petitioners

In the first review proceedings before the Court of Appeals the State of New York alleged that "[i]t stands in *parens patria* to the vessels calling at ports in New York State and the millers located in New York State" (New York brief to the Court, dated June 10, 1976). In fact, the State of New York was never authorized to represent either flour millers located in the state of New York or water carriers serving the Great Lakes in either the proceedings before the Commission or the review cases con-

sidered by the United States Court of Appeals for the Second Circuit. To the contrary, New York was permitted to intervene in the Commission proceedings for the limited purpose of representing "the Mayor of the city of Buffalo, the county of Erie, the Niagara Frontier Transportation Authority, an agency of the state of New York and the Buffalo area Chamber of Commerce."

Several flour milling companies having facilities at Buffalo, New York were represented by separate counsel in the Commission proceedings but chose not to seek judicial review of either of the Commission's final decisions. Great Lakes water carriers were also represented by separate counsel in the Commission proceeding but, with the exception of S & E Shipping Corp. discussed below, took no part in the judicial review proceedings. In fact, as previously noted, the petition for reconsideration which Lake Carriers' Association filed with the Commission in the summer of 1974 stated that the summer rate level "should not be pegged any lower than 88¢" at a time when said rate had been increased to 89¢ per cwt. Lake Carriers' petition for reconsideration to the Commission concluded:

> "In essence, as long as the alternative costs to the shipper all-rail versus lake-rail are equivalent, the lake carrier industy has no objection."

While New York continues to claim that it represents the interests of all of its citizens, including water carriers and flour millers, its authority to represent other interests, which originally derived from the petition for intervention which it filed in the Commission proceedings, is much more limited. In fact, as noted by amicus briefs being filed

herewith, the position taken by the State of New York in this proceeding is contrary to the position of at least two flour milling companies located in the state of New York, including one company having a flour mill located in the city of Buffalo.

The standing of S & E Shipping Corp. to seek the issuance of a writ of certiorari is even more tenuous. S & E Shipping represented to the United States Court of Appeals in its motion for leave to intervene in the first review case, that it "is the successor in interest to the Kinsman Marine Transit Company, which was a party to this [Commission] proceeding." However, while Kinsman Marine filed a "Protest and Petition for Suspension and Investigation" of the proposed unit train rates on October 23, 1973, counsel for Kinsman Marine advised the Commission, by letter dated January 16, 1974, that it was "withdrawing as a party to the proceeding. Kinsman will pursue its interest in this matter as a member of the Lake Carriers' Association another protestant in this proceeding." Lake Carriers' Association, as noted above, advised the Commission in the summer of 1974 it had no objection to the level of the summer unit train rate.

S & E Shipping, as successor in interest to Kinsman Marine Transit Co., should have been bound by the Lake Carriers' Association statement of position set forth above insofar as the § 3(4) discrimination issue now before this Court is concerned. Furthermore, it is highly significant that S & E Shipping vigorously asserted throughout the two proceedings before the United States Court of Appeals that it was not subject to part III of the Interstate Commerce Act because it held no water carrier authority from the Interstate Commerce Commission. Consequent-

ly, because S & E Shipping is not a "connecting line" within the context of § 3(4) of the Act it has no standing to claim protection under that provision.

The remaining petitioner, Seafarers International Union of North America, AFL-CIO, also failed to show any legitimate interest in the subject covered by its petition for writ of certiorari. Its petition to this Court is completely silent on that point. While presumably Seafarers Union is the collective bargaining representative for certain seafarers operating on the Great Lakes, it has never made any representation to the Commission or the Court below as to how its membership could be affected by an order of the Interstate Commerce Commission upholding the lawfulness of certain unit train grain rates.

No Violation of § 3(4) Shown by Petitioners

In strict compliance with the Court's prior remand, the Commission's January 18, 1978 decision carefully considered the question of whether the summer unit train rate discriminated against connecting lines in violation of § 3 (4) of the Act. It found that no discrimination existed at Buffalo, New York since the applicable rail rate from Buffalo to Martins Creek, Pennsylvania was identical whether grain moved inbound to Buffalo by rail or by water. It found there was a potential for § 3(4) discrimination at Chicago since Conrail's division of the unit train rate for handling traffic from Chicago to Martins Creek was less than the rate which would be charged if grain were delivered to Conrail at Chicago by a water carrier. However, as previously noted, the Commission's January 18, 1978 decision then concluded:

> "Since it appears that Conrail now stands ready and willing, upon request, to handle ex-lake traffic from Chicago on the same basis as it now handles ex-rail traffic from Chicago. there appears to be no violation of section 3(4) of the Act."

In affirming this decision the Appeals Court expressly recognized that water carriers seeking to interchange grain with Conrail *at either Chicago* or *Buffalo* would be entitled to the same rate for movement to Martins Creek, Pennsylvania as was available to Conrail's rail connections at those points. Accordingly, following *Pittsburgh & W. V. Ry. Co. v. United States,* 41 F.2d 806 (1929), *Atlantic Coastline Railroad Co. v. United States,* 205 F. Supp. 360, *aff'd,* 371 U.S. 6 (1962), and *Arrow Transportation Co. v. United States,* 176 F.Supp. 411 (1959), *aff'd,* 361 U.S. 353 (1960), the Court affirmed the Commission's decision. Relying specifically on *Arrow Transportation Co.,* the Court stated:

> "With respect to lake traffic, the yardstick for measuring discrimination is 'the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination' [citing *Arrow Transportation Co.*]. The Commission was satisfied in this case that, where comparable conditions between lake and rail carriers existed, equal rate treatment was available and that, accordingly, there was no violation of section 3(4)."

While the petitioners herein do not dispute the Commission's finding, specifically affirmed by the lower court, that identical outbound rail rates from both Chicago and Buffalo are available regardless of how traffic moves in-

bound to those ports, New York's petition concerning this subject is extremely misleading.

At page 8 of its petition New York first alleges that "S & E Shipping Corporation, a lake carrier, is protected by section 3(4) and is discriminated against."[7] New York then alleges that the "discrimination" against S & E Shipping "is that Conrail charges twice as much per mile when it connects with the lake carriers at Buffalo than when it connects with another railroad."

Phrased less artfully, an accurate description of the position taken by New York and its co-petitioners would be: A section 3(4) violation exists because:

> "Conrail charges twice as much per mile under an applicable 5-car rate from Buffalo, New York to Martins Creek, Pennsylvania (a distance of 340 miles) as it charges in moving 50-car unit trains from Chicago, Illinois to Martins Creek (a distance of 910 miles)."

While the foregoing restatement of petitioners' position accurately reflects the facts developed in the Commission proceedings and accepted by the Court of Appeals, it completely fails to demonstrate the existence of any § 3 (4) discrimination at either Buffalo, New York or Chicago, Illinois. Nevertheless, this is the principal thrust of the § 3(4) argument contained in the petitions filed with this Court.

In essence, each of the petitions seeking the issuance of a writ of certiorari contends a per se violation of § 3(4) of the Act exists because Conrail's division of the unit train rate from western origins to Martins Creek returns

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[7]As previously noted, this statement is incorrect. S & E Shipping, which holds no common carrier authority from the Interstate Commerce Commission, is not a "connecting line" within the context of § 3(4).

less revenue per mile or per ton mile than does Conrail's 5-car rate from Buffalo to Martins Creek. The novel rate-making concept advocated by New York, et al. finds absolutely no support in § 3(4) of the Interstate Commerce Act which, as relevant herein, merely prohibits discrimination against "connecting line" water carriers at given Great Lakes ports.

The unit train rate here involved was published to permit the railroads to compete for a portion of the grain traffic moving from Duluth-Superior to Martins Creek which would *all* move lake-rail or lake-truck via Buffalo, New York if the unit train rate were cancelled. It was supported by ConAgra, the milling company located at Martins Creek, Pennsylvania, because the unit train rate afforded that company competitive transportation alternatives. The position espoused by petitioners herein, that the unit train rate is unlawful so long as it produces less revenue per mile than that realized by Conrail in moving grain from Buffalo to Martins Creek, would completely deprive the Soo Line of the ability to compete for any portion of this traffic to its detriment and that of the shipper who desires to preserve its present transportation alternatives. Application of this anti-competitive principle in the instant case, where the sole beneficiary would be exempt water carriers having no authority from the Interstate Commerce Commission, would be particularly egregious.

Other Allegations are not Properly Before the Court

The petitions filed by both S & E Shipping Corp. and Seafarers contain extensive argument supporting their position the proposed unit train rate violates the National

Transportation Policy. This issue was never raised in the two review cases heard by the Court of Appeals and is not properly before this Court. Furthermore, this contention is diametrically contrary to the National Transportation Policy enunciated in the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 10101. That section provides, in part:

> "(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, . . . it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—
>
> (1) to recognize and preserve the inherent advantage of each mode of transportation;
>
> * * *
>
> (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
>
> (4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;"

As heretofore shown, the position espoused by petitioners herein is anti-competitive and, if adopted, would subvert the National Transportation Policy.

Seafarers' petition also alleges that the second decision of the United States Court of Appeals had the effect of reversing the first decision in the same case. This contention is also without merit. The first decision of the United States Court of Appeals merely remanded the matter to

the Commission to further consider whether or not the unit train rate violated § 3(4) of the Act. Following remand the Commission scrupulously complied with the Court's mandate and concluded the unit train rate did not violate § 3(4). This conclusion was affirmed by the Court in its May 7, 1979 decision and reaffirmed by both the panel rendering that decision and the Court en banc by orders dated January 31, 1980. The same arguments which petitioners herein urge upon this Court were considered and rejected by the Court of Appeals en banc.

CONCLUSION

For all the reasons set forth above, the issuance of a writ of certiorari should be denied.

Respectfully submitted,

June 19, 1980.

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